BEFORE THE CALIFORNIA ENERGY COMMISSION

OF THE STATE OF CALIFORNIA

In the Matter of:	)	
	)	
The Preparation of the 2005	)	Docket No. 04-IEP-01D
Integrated Energy Policy Report	)	
	)	

CONCURRENT POST-HEARING BRIEF OF SAN DIEGO GAS & ELECTRIC COMPANY

I.

INTRODUCTION

San Diego Gas & Electric Company (SDG&E) hereby files its concurrent post-hearing brief in the portion of this 2005 Integrated Energy Policy Report (IEPR) proceeding addressing the appeals filed by SDG&E, Southern California Edison Company (SCE), and Pacific Gas and Electric Company (PG&E) regarding the Executive Director's Notice of Intent (NOI) to Release Aggregated Data, dated June 3, 2005.[1/] While the California Energy Commission (CEC or Commission) Executive Director agreed to retain some of the utility resource planning data confidential in the Staff aggregation proposal, three categories of data were not protected that caused SDG&E particular concern. Therefore, SDG&E filed its Appeal as directed in the NOI on June 17, 2005. SDG&E submitted direct and rebuttal testimony on July 8 and August 12, 2005, respectively, and a hearing was convened at the CEC on August 24, 2005, to gather

---

[1/] The appeals of the three investor-owned utilities (IOUs) are similar, but not identical, in terms of the precise categories of data for which confidential protection is sought. These differences are due primarily to the IOUs' differing system characteristics and procurement portfolios.

additional evidence. The appeals are currently scheduled for consideration at the CEC's September 7, 2005 Business Meeting.

SDG&E also supports the Joint Settlement Offer that the three IOUs submitted to the CEC on August 31, 2005. SDG&E believes a settlement would indeed be a better outcome than proceeding with time-consuming litigation over what is essentially a very narrow disagreement. SDG&E urges the CEC to approve the settlement or, at a minimum, encourage the CEC Staff to undertake good faith settlement negotiations and hold this matter in abeyance while that effort takes place.

II.

BACKGROUND AND EXECUTIVE SUMMARY

Although the record in this proceeding has mushroomed to hundreds of pages of testimony discussing such topics as auction theory, "winner's curse," and the laws of supply and demand, in fact the issues in controversy here are minimal and straightforward. SDG&E is not challenging the majority of the NOI aggregation proposals that would be publicly released. Out of 10 (previously 12; the Staff withdrew two) aggregation categories, SDG&E appeals only the three levels of forecasted capacity needs that it regards as the most highly sensitive: (1) bundled annual capacity at the utility-specific level, (2) quarterly capacity at the utility-specific level, and (3) quarterly capacity at the planning area level.[2/]

As discussed in more detail below, protecting this data is fully consistent with the applicable legal standards under the Public Records Act, trade secret law, and Section

[2/] Because SDG&E's planning area only consists of the utility's service territory plus direct access, its planning area is different as compared to the other two IOUs, which have more municipal load in addition to direct access. As such, it is logical that SDG&E may have more planning area level concerns as compared to SCE and PG&E.

454.5 of the California Public Utilities Code, as well as relevant rulings and decisions of the CEC's sister agency, the California Public Utilities Commission (CPUC). In addition, as SDG&E Witness Mike McClenahan explained, the crux of SDG&E's concern is that the more suppliers understand the nature of a utility's procurement needs, ratepayers could be disadvantaged in terms of procurement prices compared to what they would otherwise pay. Even worse, if suppliers understand - even generally - the prices that the IOUs might be willing to pay, they could then conclude that they would prefer to offer their supplies outside California altogether, thus aggravating rather than mitigating regulators' concerns about sufficient future supply.

Although the CEC witnesses claimed benefits to ratepayers from more rather than less disclosure of confidential procurement data, they failed to offer any compelling direct support for those claims. Their assertions instead relied upon broad, generalized assertions, such as other utilities in the West had not experienced harm from broader disclosure, similar information is already publicly available, and the data is not a "trade secret." As discussed in more detail below, these arguments are without merit. Furthermore, to the extent this issue is even a "close call" where equally skilled experts may simply disagree, the Commission should decide this issue in a manner that avoids the potential harm to ratepayers in the form of higher power prices.

In addition, granting the utilities' appeals will not delay or impede in any way the effective and efficient resource planning taking place in the IEPR. The utilities provided extra tables with summary forecasted energy and resource data with their April 1 resource plan filings. These tables were specifically designed for public release. In combination with the aggregation tables the CEC Staff has prepared that are not being

challenged here, the IEPR will reflect a robust public debate as well as provide necessary market signals for future investment, the CEC's primary concerns here.

Finally, in the alternative to granting the appeal, the CEC could simply refrain from deciding these appeals while the CPUC's Confidentiality OIR is pending, which would also be consistent with the partial relief sought in the Joint Offer of Settlement. The CPUC is in the midst of evaluating procurement data in the OIR and how it should be categorized for confidentiality purposes. To decide here how specific data should be treated may turn out to be contrary to the ultimate result in that proceeding, yielding an inconsistent and unworkable patchwork of regulations that apply to the same information. In sum, SDG&E can discern no benefit to releasing this data, whereas several types of harm to ratepayers may occur if it is publicly disclosed.

III.

ARGUMENT

A. The Disputed Data Are Trade Secrets Under The Law And Should Therefore Be Protected.

As noted above, the scope of data under consideration in this appeal is very narrow. For the three disputed scenarios that SDG&E appeals, SDG&E does not believe that the CEC's aggregation proposals are justified under the legal standards that apply to the utilities' confidential information in this proceeding. Nothing deduced at the hearing in any way changes SDG&E's previous position on this point, and indeed the hearing further underscores the legitimacy of SDG&E's perspective.

Under the Public Records Act (PRA),[3/] records subject to the privileges established in the Evidence Code are not required to be disclosed.[4/] Evidence Code Section 1060 provides a privilege for trade secrets, and the PRA specifically states in this regard as follows:

> (d) Except as otherwise provided in subdivision (e) and Chapter 3 (commencing with Section 99150) of Part 65 of the Education Code, **trade secrets are not public records** under this section. "Trade secrets," as used in this section, may **include, but are not limited to**, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is **known only to certain individuals within a commercial concern** who are using it to fabricate, produce, or compound an article of trade or a service **having commercial value** and which gives its user an **opportunity to obtain a business advantage over competitors who do not know or use it** (emphasis added).

As is plainly evident, the definition of "trade secret" is not only broad, but the list of examples quoted in the above definition is non-exclusive. SDG&E's proprietary demand forecast at the quarterly and annual levels would clearly come within the scope of "formula, plan, pattern … or compilation of information;" this data is certainly not known beyond certain individuals on a "need to know" basis, and SDG&E takes significant steps to keep the data secure and limit access to the information;[5/] the data is central to providing SDG&E's "trade" or "service" of meeting its obligation to serve and satisfying the procurement needs of its customers in a "least cost, best fit" manner; and finally, as testified to by Witness McClenahan and others, commercial value and business advantage would accrue to the market activities of any supplier that has this information, as well as to the many consultants, such as the CEC's Witness Frayer, who make a business out of analyzing and selling such data. The proposed aggregations that SDG&E

[3/] Government Code Section 6254(k).
[4/] Government Code Section 6254.7(d).
[5/] See, e.g., April 1, 2005, Resource Plan Confidentiality Application.

contests here show with sufficient precision SDG&E's forecasted procurement, and little or no "reverse engineering" is even required to provide a business advantage to others who would make use of it.

It is well established that the Courts protect trade secret information where the above criteria are met, as is easily the case here, and they further understand that absent protection harm may result (see, e.g., *Klamath-Orleans Lumber v. Miller* (1978), 87 Cal. App. 3d 458). Among the harm that disclosure causes is the ability of competitors to gain knowledge at the expense of the privilege holder (*Pepsico v. Raymond* (9th Cir. 1995) 54 F. 3d 1262). In addition to the Courts regularly protecting trade secret information, the CPUC also recognizes that utility trade secret information may be kept confidential under appropriate circumstances (see generally, e.g., R.97-04-010, 71 CPUC 2d 485; D.02-12-074, 2002 Cal. PUC LEXIS 905; D.98-02-041, 78 CPUC 2d 486). The CPUC has stated, for example, as follows: "The utility may file [a motion for protective order] to protect either its own trade secrets or those of its customers…" (D.93-02-058, 1993 Cal. PUC LEXIS 118, *25).

CEC Witnesses Kennedy, Jaske and Frayer all assert that the data at issue in the appeal is not "trade secret," but these arguments clearly fail. As an initial matter, none of them is even qualified to make that assessment as a matter of law.[6/] As described herein, the disputed data in fact meets all the criteria of the legal standard for a trade secret. That the data is commercially valuable is even underscored by CEC Witness Frayer, who discusses in particular the expertise that is necessary to analyze and understand the supposedly-not-trade-secret data.

[6/] See, e.g., Kennedy/CEC, Tr. at 336.

Ms. Frayer stated, for example, that understanding the Federal Energy Regulatory Commission (FERC) Electronic Quarterly Report (EQR) database requires "a certain level of sophistication" and mining the data "is a very time consuming and relatively costly process."[7/] At the hearing and in her subsequent August 31 Declaration, she further reinforces this view. When asked about the EQR numbers in her testimony for the three IOUs, one figure that is drastically higher than the others she indicated was probably a typo.[8/] In her later declaration, however, she indicated that in fact the figure was correct. This example points out all too well that even for an expert whose business revolves around analyzing this type of information, proprietary, expert interpretation is necessary to make "sense" of this data. As such, Ms. Frayer illustrates precisely the "compilation of information" and "commercial value" elements of the trade secret test. Suppliers and others certainly would not try so hard to get the IOUs' procurement data and firms like Ms. Frayer's would not have the clients available to pay for their analysis of this data if it did not have substantial commercial value.

Witness Jaske further emphasizes this point by stating that "whole firms have sprung into existence just to assemble and distribute" data such as the IOUs appeal here.[9/] The fact that this data is valuable and requires interpretation and "assembly" argues strongly for its status as protected trade secrets. These witnesses illustrate, therefore, that it is not merely data that is confidential, it is the expert knowledge required to "assemble" and interpret that data that formulates a critical basis for the trade secret status of this information.

[7/] Frayer/CEC, Rebuttal, Att. E, p. 20.
[8/] Frayer/CEC, Tr. at 333.
[9/] Jaske/CEC, Direct, p. 7.

B. The Public Interest Balancing Test Also Requires That The Data Be Protected To Avoid Potential Harm To SDG&E's Customers.

Under the Public Interest Balancing test provision of the PRA, the case for protecting this data from disclosure has also been met. Section 6255 of the Government Code states that "the agency shall justify withholding any record by demonstrating that …the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record…."[10/] All of the utility witnesses unequivocally established during the hearing as well as throughout their written testimony that customers could easily be harmed in the form of higher power prices if the utility's forecasted procurement needs are known.[11/]

SDG&E Witness McClenahan testified, for example, that his background and experience have provided him with extensive knowledge of how counterparties could make use of market sensitive information and other market intelligence to obtain the highest possible prices for their products. As he and PG&E Witness Shandalov explained, the attempt to collect as much information about the market as possible is typical behavior on the part of participants in this market.[12/] Witness McClenahan explained that the more information suppliers can obtain, the more refined their market view becomes, which determines how they will price products in the market to maximize returns. In order to trade most effectively, counterparties desire to know the positions and motivations of their potential trading partners, a point that was emphasized by PG&E as well.[13/] The CPUC in fact recognized this feature of the market when it returned the

---

10/ Government Code Section 6255(a).
11/ McClenahan/SDG&E, Direct, pp. 1-5.
12/ McClenahan/SDG&E, Direct, pp. 1-3; Shandalor/PG&E, Direct/Appeal, p. 2.
13/ Id.

IOUs to procurement in January, 2003, and incorporated strict rules to ensure that highly sensitive, proprietary trade secret data was kept secure.[14/]

As Witness McClenahan also explained, it is not necessary for potential counterparties to know the utility's needs with specificity to cause an effect on their pricing: "The information counterparties require to gain this competitive advantage falls into two general categories: (1) the information that allows competitors to know, not necessarily with exactitude but even simply with reasonable certainty, what their potential counterparty's position is (short, as a buyer in the market, or long, as a seller) and a feel for the magnitude of that need to buy or sell; and (2) the information that informs a competitor of the value that its potential counterparty places on various goods or services."[15/]

The first category of data includes items that would reveal SDG&E's bundled customer net short/long positions at various times of the year, either directly or through the combination of particular pieces of sensitive data with other data that may be available publicly. The data in this category could be the net short/long itself (the recent or forecast buys/sells of SDG&E) or those "pieces of the puzzle" that are used to calculate the net short/long.[16/] The data that is the subject of the appeal reveals with particularity the load portion of this equation, and it should therefore be protected.

SDG&E provided an example of the harm that can result from releasing the first category of data. During spring run-off, market expectations of large amounts of spill energy create expectations of low prices in high hydro years. As a result, buyers expect a fire sale and will attempt to offer to buy, not necessarily at their avoided cost of

---

[14/] Standard of Conduct #2 adopted in D.02-10-062 in R.01-10-024,
[15/] McClenahan/SDG&E, Direct, pp. 2-3.
[16/] Id. at 3.

production, but at the seller's avoided cost of spilling water. SCE Witness Dr. Plott articulated a similar point when asked to comment on prices when supplies are known to be tight: "… It's a very general principle we're talking about here, if you expect the prices to go up, you raise your prices."[17/]

Similarly, where a counterparty's valuation is known in advance, such as when solicitations for renewables are conducted with a public Commission-approved market price referent, offers to sell may well be based upon the public knowledge of the valuation of the product solicited rather than on the potential suppliers' costs.[18/] These examples therefore illustrate the principle that the more information that suppliers have about when buyers are most in need or what they are willing to pay, this information is used to suppliers' advantage. As PG&E Witness Shandalor emphasized, this is perfectly rational behavior. On the other hand, if sellers/buyers do not have access to this market sensitive information, competitors might be more inclined to offer a price closer to variable costs in order to secure the contract with the utility.[19/] Moreover, if competitors know in advance what the utility's value of energy is, then they may not bid to the utility at all, either seeking a price that is now known (because the utility price is transparent) to be higher elsewhere. Such a reaction to the known utility valuation of energy could lead counterparties to stay in the more volatile shorter-term markets rather than longer-term forward markets waiting for conditions to change.[20/]

Finally, precise quantification of bundled customer harm is unnecessary to find in favor of protecting this data. It is obviously a difficult if not impossible undertaking to

---

[17/] Id. at 4; Plott/SCE, Tr. at 106.
[18/] McClenahan/SDG&E, Direct, pp. 4-5.
[19/] Shandalov/PG&E, Direct/Appeal, p. 2; McClenahan/SDG&E, Direct, pp. 4-5.
[20/] McClenahan/SDG&E, Direct, p. 4.

measure that which did not happen ("how much higher would prices have been if you revealed your net short?"). Nevertheless, as Witness McClenahan explained, the impacts of the revelation of this data are widely understood by those who trade in the energy markets.[21/] Accordingly, the Public Interest Balancing test easily lands on the side of protecting the sensitive data under debate here.

C. Regulatory Consistency Mandates Protecting The Disputed Data.

CPUC Rulings and the last long-term resource planning decision clearly envision coordination in resource planning between the CPUC and the CEC in their integrated resource planning efforts, including in the area of confidentiality.[22/] Without consistency of data confidentiality policies, a fundamental coordination element is missing. Rather than devote additional substantial resources to this confidentiality issue at the CEC, the CPUC should be relied upon for addressing confidentiality on a broader basis. Indeed, that is the framework the CPUC clearly envisioned when it stated in D.04-12-048 that the two agencies' confidentiality regulations should be "as closely aligned as possible."[23/] SDG&E was pleased to learn at the hearing that the CEC plans to participate in the CPUC's confidentiality OIR as a party.[24/] Perhaps the necessary coordination can then take place and this matter can be set aside in favor of that effort.

Finally, Section 454.5 of the California Public Utilities Code is also pertinent here. That section requires the CPUC to maintain on a confidential basis market sensitive information related to a distribution utility's procurement plan. Significantly, that code

---

21/ Id.
22/ See, e.g., CPUC Ruling September 16, 2004 and March 14, 2004; D.04-12-048, p. 180.
23/ D.04-12-048, p. 180.
24/ Commissioner Geesman, Tr. at 338.

section does not require any demonstration of "ratepayer" harm, even though that risk is clearly present here.

Moreover, in discussing the obligations imposed under Section 454.5, the CPUC explained in its last resource planning decision the importance of maintaining the protections required under Section 454.5:

> Currently under … Section 454.5 to the Pub. Util. Code, the Commission is to have in place ***procedures that ensure the confidentiality of any market sensitive information submitted by an IOU as part of its proposed procurement plan***, while ORA and other consumer groups that are not market participants (NMP) have access to the information under confidentiality provisions. This provision of ***AB 57 was an attempt to balance the compelling ratepayer interest in ensuring that certain legitimately confidential information is kept out of the hands of those who can use it to manipulate wholesale energy markets***, with promoting a sufficiently transparent decision-making process to allow for scrutiny and review by the legislature and the public.[25/]

While the precise terms of Section 454.5 do not apply to the CEC, failure to recognize this provision in a CEC proceeding that is being conducted jointly with the CPUC will yield irreconcilable outcomes that could lead to ratepayer harm. When such a negative outcome is so easily avoidable, efforts should indeed be taken to ensure consistent positions are maintained between the two agencies regarding confidentiality.

IV.

CEC STAFF'S ARGUMENTS ARE UNPERSUASIVE

CEC Staff has generally claimed in this proceeding that the data that SDG&E and the other IOUs want to protect is not a trade secret or that the public interest would be better served by releasing more procurement data rather than less. While the flaws of

[25/] D.04-12-048, p. 177.

these arguments are too numerous to all be addressed here, SDG&E will discuss the most egregious errors in the Staff's position below.

A. CEC Staff Made No Headway On Its Arguments During The Hearing.

CEC Staff emphasized several points during the hearing in an effort to buttress their positions strongly favoring disclosure of this highly sensitive data. First, Staff attempted to show that utility demand is basically "elastic," and if a utility does not like prices or some other aspect of an RFO, the utility can simply buy nothing and conduct another RFO. Second, CEC staff attempted to argue that nothing as dire as the energy crisis could again result, so there is no basis for the utility's concerns about possible harm that might result from disclosing more (rather than less) procurement information to suppliers. These positions are unpersuasive.

On the first point, without even debating the "elasticity" of utility customer demand, the CEC Witnesses have a completely unrealistic notion of the RFO process. The RFOs go through extensive preparations and analysis before they are even issued, after which there is a further lengthy and detailed process to receive the bids, evaluate them, negotiate contracts, and secure the necessary regulatory approvals. It makes little sense to invest all of that time and effort and assume as the CEC does that the results could simply be casually tossed aside along the way or at the end of the process. Furthermore, RFOs are issued because the utility identifies needs that must be filled. Given how lengthy large capital addition RFO processes can be, and particularly for a smaller size utility such as SDG&E, it would be foolhardy to assume that issuing multiple RFOs, one after the other, could allow for meeting critical resource needs in a timely fashion.

As to the second point, the CEC misunderstands SDG&E's concerns regarding release of the sensitive procurement data that SDG&E appeals here. CEC Witness Kennedy and others claim that the IOUs fear unleashing market manipulation on the scale of another energy crisis if this data is released, and they argue that market circumstances are now sufficiently changed so that fear is unrealistic.[26/] Contrary to this claim, SDG&E has not relied on the threat of another energy crisis as the basis for its concerns over releasing the data that is the subject of this appeal. And without even addressing the merits of that issue, SDG&E's concern over releasing this data arises long before such an outcome might occur. Rather, as SDG&E has pointed out, suppliers will as part of their normal business conduct gather as much information about the market and their counterparties as is available. Therefore, ratepayer harm can result if the suppliers have an information advantage that allows them to understand SDG&E's more granular and specific needs in a way that would permit them to charge higher prices than they might otherwise.

B. CEC Is Incorrect In Stating That If "Similar" Data Is Available, Then This Disputed Data Should Be Released.

Witnesses Jaske and Frayer claim that "similar" IOU procurement data is already publicly available,[27/] so the CEC should simply proceed to release the disputed data here as well. First, SDG&E questions whether "similar" data is in fact available, and of

---

[26/] See, e.g., Kennedy/CEC, Direct, pp. 6-7.

[27/] Frayer/CEC, Direct, p. 2, line 26: "In reality, these aggregated summary tables serve as a refinement of the existing public knowledge base, effectively a replacement (or substitute) for already available information"; Jaske/CEC, Direct, p. 7: "Those in the industry with detailed knowledge of utility resources make sophisticated estimates about the energy to capacity relationship of the data that have already been revealed…. Thus, the IOU – specific data that the Energy Commission proposes to release is at best a modest improvement…"; Kennedy/CEC, Direct, p. 4: "The IOUs' claims of economic harm if these summaries are released fail to account for … the availability of similar data for the IOUs…"

course "similar" is to a large extent in the eye of the beholder. Ms. Frayer, for example, first argues that FERC EQR data is "the exact same information" as the IOUs submit to the CPUC in the resource planning proceeding, yet that fact is not in evidence in looking at her testimony.[28/] In fact, she admitted that she has not personally reviewed any of the data that SDG&E submitted in the CPUC proceeding,[29/] so she is not even in a position to make that assertion. She further admitted that the FERC EQR is historic, whereas the key data submitted in the CPUC resource planning case is forecast. As such, her statement that similar/exact data is already publicly available is simply not accurate.

Second, without conceding that the appealed data is in fact "similar," even if that assertion were true there is a large gap between "similar" and the "same." Similar data may in fact provide that critical, incremental information that would verify a potential seller's analysis. Indeed, it is the packaging of this "similar" data that provides the means for sellers to confirm the "inferences that the generator and energy consulting community have already developed"[30/] that also has value.[31/] Should ratepayers be funding this type of free consulting to their counterparties in the market? By releasing more pieces of the puzzle, consultants and suppliers can have their "guesstimates" confirmed, verified, and corrected – all at the ratepayers' expense. Not only might higher prices result, power shortages could also occur if suppliers simply feel prices will be higher elsewhere, and they may not even offer their supplies in SP-15.

If in fact this information is already available as claimed by all three CEC witnesses, then one is left to wonder (1) why parties to proceedings at the CPUC

[28/] Frayer/CEC, Rebuttal Att. E, p. 11.
[29/] Id. at Tr. 332.
[30/] Jaske/CEC, Direct, p. 7.
[31/] McClenahan/SDG&E, Rebuttal, p. 4.

relentlessly pursue release of this type of data that is supposedly already available to them and (2) whether the economic benefits that the CEC seeks to achieve by releasing confidential data would already be integrated into the market, thus mooting the issue here.

CEC Witness Jaske also argues extensively that either the same or similar data as what is being appealed here was provided publicly in the Avoided Cost proceeding at the CPUC (R.04-04-025). SDG&E disagrees that the exact same data as SDG&E appeals here has been provided publicly, and if "similar" data was provided, it was done so pursuant to a Protective Order that was adopted for use in that proceeding. As such, the CEC must reject Witness Jaske's arguments on this point, especially when he conceded during the hearing that it may not in fact be the same data.[32/] The stakes are too high to utilize such a loose and potentially harmful standard for confidential data release.

Witness Jaske also cites examples of how individual public data can be used to "reverse engineer" other data that is deemed by the IOUs as confidential, so this "similar" data should be released.[33/] As he points out, every individual piece of data is but one piece of a larger puzzle that is the commercial position of utility ratepayers. Witness Jaske's examples provide an excellent basis for limiting - - not expanding - - data release. Even seemingly innocuous data can be used to obtain more sensitive data, and it is therefore difficult to even know what data can really be considered innocuous.

Witness Jaske further contends that even the release of a utility's residual net short (RNS) data (which would disclose the extent and timing of ratepayer need and is therefore some of the most commercially sensitive ratepayer data) may be acceptable

---

[32/] Jaske/CEC, Tr. at 202.
[33/] Jaske/CEC, Direct, p. 6

because the IOUs will procure through "a whole variety of solicitations."[34/] Therefore, the RNS knowledge "does little to affect how generators will bid on any one." This unsupported conclusion ignores the fact that for a utility the size of SDG&E, it is unlikely to have many solicitations. Witness Jaske stated during the hearing he did not know exactly how many RFOs SDG&E could or would issue.[35/] Therefore, the better conclusion is that release of RNS could be detrimental to ratepayers of SDG&E.

Witness Jaske also argues at length as "evidence" that other Western utilities disclose the same or more data without apparent harm, so the California IOUs should do the same.[36/] First, Witness Jaske is in no position to testify on behalf of those utilities and whether they have been harmed by their data disclosure practices. How can he possibly conclude that they would not be paying less if suppliers knew less about their needs? He also admitted that the entities he cited disclosed their procurement data under vastly differing circumstances; in some cases through one time only RFOs.[37/] Without having any meaningful sense of the circumstances of this "reporting," it offers little significance to this proceeding.

Second, as SDG&E Witness McClenahan testified, these other IOUs are not necessarily similarly situated to California IOUs in key respects, such as the level of present or future departing load, the amount of generation they own, or their access to transmission.[38/] Without confirming, comparing, and analyzing all those details there is no basis to conclude here that California utilities should disclose similarly to them. In

---

[34/] Id., Direct, p. 12.
[35/] Id., Tr. at 329.
[36/] Jaske/CEC, Direct, pp. 4-6.
[37/] Jaske/CEC, Tr. at 330.
[38/] McClenahan/SDG&E, Rebuttal, p. 9.

fact, maybe those other IOUs are disclosing too much, and they should be following California's model -- not the other way around.

C. Three Years Of Confidentiality Is Insufficient.

All three CEC witnesses make the point that any potential harm caused by the release of this data is mitigated by the fact that the first three years are held as confidential.[39/] This reasoning is flawed because it misunderstands the nature of acquiring major capacity additions in California. In particular, due to the long lead times for permitting, acquisition, approval and construction of electric infrastructure (both generation and any required associated transmission), the need to begin the acquisition process for resources to be available in 2009 is already here. As such, releasing 2009 data is very much as large a danger (or larger, given the value of large, discrete capacity additions as compared to a larger number of smaller spot market transactions) as the release of more recent data (2006-2008).[40/]

D. There Is No "Need" For The Public Release Of The Data At Issue In This Proceeding.

All three CEC Witnesses also make broad, generalized claims that the data at issue here must be released to accomplish a list of goals, such as the reduction of the uncertainty for sellers, allowing regulators to conduct necessary planning, and the

---

39/ Frayer/CEC, Direct, p. 19: "The NOI includes adequate controls to prevent market manipulation…the first three years of the forecast time horizon (2006-2008) from the resource plan will not be released"; Jaske/CEC, Direct, p. 13: "Thus for the period 2009 to 2016, which is the time period in dispute…There are no mandatory purchase requirements that far forward"; Kennedy/CEC, Direct, p. 3: "Data submitted for years 2006-2008 would not be published…Staff has consistently recognized that the data for near-term years is more sensitive…" and (p. 5) "The potential harm that may come from market manipulation evaporates when additional time is available…"

40/ McClenahan/SDG&E, Rebuttal, pp. 1-2.

promotion of investment and greater competition in the market.[41/] These claims cannot stand scrutiny. They overlook, for example, the fundamental point that a utility's RFO will inform sellers of *exactly* the resource need that the IOU seeks to fill. In this sense, sellers are given perfect knowledge and do not need to rely on aggregated summary data tables or "sophisticated estimates" made by sellers and their consultants. The release of an IOU solicitation, with its precise communication of need, will serve to promote vigorous competition and long-term contracting as demonstrated by SDG&E's 2003 RFP that resulted in three new power plants in SDG&E's load pocket. In addition, planning and infrastructure investment continue in transmission as evidenced by the recently completed Miguel-Mission #2 line and the upgrades at Path 15.[42/]

It is also important to recall that all non-market participants who request the confidential resource planning data have full access, and there should be no further need for sellers to develop their own independent assessment of IOU need. As such, Witness Jaske's claim that this data release is "essential to electricity planning in California" ignores the fact that this data is already available to planners, regulators, and the IOUs' PRGs. In any event, planning has and continues to occur without the widespread public release of this data.

41/ Frayer/CEC, Direct, p. 26: "The information encapsulated in the aggregated summary tables will provide accurate and necessary signals on the need for new generation investment, further supporting the development of a robust competitive electric industry…"; Jaske/CEC Direct, p. 3: "The aggregated summaries, if not the resource plan data themselves, are essential to electricity planning in California"; Kennedy/CEC, Direct, p. 5: "…failure to make this type of planning information freely available has the potential to perpetuate non-competitive markets."

42/ McClenahan/SDG&E, Rebuttal, p. 2.

E. Basic Misunderstanding Of The California Market.

Throughout the testimony of the CEC witnesses, there are statements that call into question their fundamental understanding of the California market.[43/] As such, their conclusions about what's best for the market must be cautiously received. The witnesses fail to realize, for example, that there is at least one centralized market operated by the Intercontinental Exchange (ICE), and there is the equivalent of an "open outcry" trading system available through voice brokers. Both of these markets provide valuable service in allowing willing buyers and sellers to transact in an open, transparent manner. In addition to the price discovery created by these markets, there has been considerable effort in the last two years to increase the quality and quantity of price data reporting by various energy publications.[44/] As such, there is far more data and transparency available than the CEC implies.

In addition, Witness Kennedy is confused about the amount of DWR contract data that is publicly available. There are many important, commercially sensitive aspects of the DWR contracts that are not public, such as the price of gas delivered to any individual IOU tolling contract and the level of generation at the dispatchable DWR contract units.[45/] In sum, while the CEC Witnesses have admirable credentials, they lack key expertise in understanding the California market as energy traders. Their opinions, therefore, regarding how procurement data should be treated for confidentiality should be given less weight than the testimony presented by SDG&E and the other IOUs.

[43/] Frayer/CEC, Direct, p. 7 footnote: "I use the term California market" broadly in this testimony. Although I realize that there is currently no centralized day ahead market for electricity…"; Jaske/CEC, Direct, p. 8: "There is no organized Day-Ahead energy market, but there are a few thinly traded, standardized contract forms that allow for a limited degree of price discovery."

[44/] McClenahan/SDG&E, Rebuttal, pp. 5-7.

[45/] Id. at 10.

E. Lack Of Proof For Claims That Data Release Will Not Harm Ratepayers.

While CEC claims that only the IOUs have a burden of proof in the dispute over protecting ratepayers from the harm caused by releasing commercially sensitive data, the three CEC Witnesses' testimony is remarkable in one common characteristic – they are all lacking in anything that could be called "proof" to support their assertions of the benefits of the release of data at issue in this proceeding. The CEC witnesses certainly do not come close to meeting the standard to which the IOUs are apparently being held.

As just one example, Witness Frayer states in her Direct Testimony at p. 17: "Thus, risk aversion appears to be a good characterization of market participants in these procurement processes, ***suggesting*** (emphasis added) that information dissemination which reduces uncertainty would have a beneficial repercussions for buyers and, thus, for ratepayers." In this single example, as with numerous others, we are offered no concrete evidence that their assertions of "benefit" are true or correct.

It is also important to note that Witness Kennedy basically refutes his entire argument supporting data release by conceding that "some market manipulation is possible," but the IOUs are much "less vulnerable" now.[46/] The CEC cannot have it both ways: either release of IOU data is beneficial to the market and to ratepayers or market manipulation (among other problems) is possible and public release of sensitive commercial information should be avoided. Like the other CEC witnesses, Witness Kennedy does not offer any quantitative or qualitative "proof" for his assertions. He further stated that he has not calculated how much ratepayers still stand to lose with more

[46/] Kennedy/CEC, Direct, p. 6.

data release, even given their "less vulnerable" current state.[47/] In addition, how much harm to the market is acceptable for ratepayers if the data release has offsetting benefits for sellers?

V.

CONCLUSION

SDG&E supports the CEC's need to ensure that its IEPR is comprehensive and that it provides a useful planning tool, in addition to being the product of vigorous public scrutiny and debate. All of these objectives can still be fully met with the granting of the appeals here. SDG&E urges the Commission to recognize the narrow basis of SDG&E's request and the substantial evidence that SDG&E presented to support the legal and factual grounds for its confidentiality appeal. The CEC Witnesses have not presented compelling counter-arguments to SDG&E's concerns, which are firmly grounded in the sole objective of ensuring that ratepayers are not harmed or disadvantaged in procurement.

DATED this 1st day of September, 2005, at San Diego, California.

Respectfully submitted,

//s//
By: _____
Lisa G. Urick

101 Ash Street, HQ-13
San Diego, California 92101
[Telephone: (619) 699-5070]
[Facsimile: (619) 699-5027]
[E-mail: Lurick@sempra.com]
Attorney for
SAN DIEGO GAS & ELECTRIC COMPANY

LD2D-**#170035**-v1-CEC BREIF CONF.DOC

47/ Kennedy/CEC, Tr. at 340.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **SAN DIEGO GAS & ELECTRIC COMPANY'S CONCURRENT POST-HEARING BRIEF** on the parties on the service list in Docket No. 04-IEP-ID by electronic mail.

Dated at San Diego, California, this 1st day of September, 2005.

//s//

Darleen Evans